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In re Application of
Michael Choi
Application No. 09/909,430
Filed: July 19, 2001
Attorney Docket No. FMC 1305 R

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DECISION ON PETITION

This is a decision on the "Petition to Withdraw Holding of Abandonment (37 CFR 1.181) and, in the Alternative Petition to Revive Unintentionally Abandoned Application (37 CFR 1.137)," filed January 18, 2006.

On January 26, 2004, the Office mailed an Office Action indicating that the amendment filed on August 11, 2003, did not comply with 37 CFR 1.173(b), which sets forth the manner of making amendments in reissue applications. The Office Action set a shortened statutory period of ONE (1) MONTH or THIRTY (30) DAYS, whichever was longer, for applicant to submit a supplemental paper correctly amending the reissue. In the absence of timely reply, the application became abandoned on February 27, 2004. On January 12, 2006, the Office mailed a Notice of Abandonment.

In the present petition, the practitioner explained that on January 26, 2004, he was the attorney responsible for this application and was employed by Kolisch Hartwell. The practitioner asserted that neither he nor Kolisch Hartwell ever received the Office Action of January 26, 2004, as evidenced by the attached docket records from Kolisch Hartwell (Attachment A, showing all replies docketed from the alleged mail date of the Office Action). The practitioner stated that he performed a search of the attached docket records and the file jacket where the non-received Office Action would have been entered had it been received and docketed.

A review of the record indicates no irregularity in the mailing of the Office Action, and in the absence of any irregularity in the mailing, there is a strong presumption that the Office Action was properly mailed to the address of record. This presumption may be overcome by a showing that the Office Action was not in fact received. To establish non-receipt of an Office communication, applicant must include a statement

from the practitioner, stating that the practitioner did not receive the Office communication and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.¹ For example, if a three-month period for reply was set in the non-received Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the non-received Office action must be submitted as documentary proof of non-receipt of the Office action. The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g. if the practitioner has a history of not receiving Office actions).

After reviewing the documents submitted on petition, the Office concludes that the showing of record is sufficient to warrant withdrawal of the holding of abandonment. The practitioner for the applicant submitted a copy of docket report from Kolisch Hartwell where the Office Action would have been entered had it been received and docketed. The practitioner attested to the fact that a search of the file jacket and docket report indicated that the Office Action was not received. As applicant has presented the required showing, the petition to withdraw the holding of abandonment is granted. The application will be restored to pending status.

In view of the above, the petition to revive under 37 CFR 1.137(b) is dismissed as moot. The \$1,500.00 petition fee will be credited to the Deposit Account, as it is unnecessary.

This matter is being referred to Technology Center Art Unit 3747 for action consistent with this decision.

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3211.

Christina Tartera Donnell

Christina Tartera Donnell
Senior Petitions Attorney
Office of Petitions

¹ M.P.E.P. § 711.03(c); See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).